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If only there were agreement on the meaning and function of law, perhaps it then would be possible to build a world order based on the obligations of law instead of force. If only there were a realistic understanding of the inadequacies or impossibilities of international law, perhaps it then would be possible to build a stable world order based on a realistic political concept of force.

These two visions of world order clashed dramatically in the period between the two World Wars.[1] The aim of this article is to tell the story of how the jurisprudence of international law came under increasing attack on two fronts in the inter-war years. On one side, the jurisprudential underpinnings of the subject was being criticized as an outdated formalistic positivism that in its petrified form was simply incapable of responding adequately to the political and social realities of the times. On the other side, the realist approach arose from a conviction that the very nature of international law was idealistic and impractical. This approach made significant headway to the point where, by the late 1930's and early 1940's, it was generally understood that orthodox international legal science had been discredited in favor of some variation of individual or collective security.[2] At the heart of the matter were several nebulous and often conflicting elements describing the jurisprudence, properly understood as legal science, of international law. First, orthodox interpretations were premised on a belief that evolving case law, promul-

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1. Douglas M. Johnston, *Functionalism in the Theory of International Law*, *in* CANADIAN YEARBOOK OF INTERNATIONAL LAW 3 (C.B. Bourne et al. eds., 1988) (international law appears to be in a perpetual crisis).

2. Clyde Eagleton, *Forces which will Shape the Rebuilding of International Law*, 36 AM. J. INT'L L. 640, 642 (1942).

gated in main by the Permanent Court of International Justice and by the national courts, constituted all the necessary and sufficient boundaries of international law. The law was thus "posited."[3] International law in this structure derived its obligatory force from such norms as secular natural law, morality, inherent rightness of law, consent, and the natural obligation to obey a nation's agreement, *pacta sunt servanda*. At its most basic point was the understanding that law and force were antithetical and, that in the long run, force could never form the basis of a harmonious world. Even after American entry into World War II, this position continued to be affirmed by orthodox international lawyers. To this end, orthodox writings bristled with condemnation of Austinian legal theory that had pronounced the sterility of international law in the absence of the command of a sovereign backed by sanctions.[4]

The philosophical attack on this jurisprudence emulated the teachings of American Sociological Jurisprudence, as formulated by Roscoe Pound and Benjamin Cardozo. Critics of the type of legal science adhered to by orthodox international lawyers took sustenance from the new legal philosophy of Sociological Jurisprudence. Although primarily concerned with reforming American municipal law, the ideas of Pound and Cardozo, in particular, were gradually adopted by opponents of orthodoxy by the mid-1920's and afterwards. The new legal vision insisted that, as in consideration of municipal law, international law had become mechanical and formalistic. The orthodox methodology of international law created rules and then forced social realities to either conform or fall aside from the rules. Sociological Jurisprudence preached that true legal science must be directed toward the achievement of justice. This meant, most importantly, that the results achieved by legal decisions trumped all other motivations behind a legal decision. In short, Sociological Jurisprudence, and what was being called "sociology of law,"[5] provided the ammunition used to attack the orthodox structure of international law at its philosophical roots.

The history of international law, however, involves much more than a debate about the nature of legal science. As already not-

3. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 780 (1988).

4. For the traditional attack on Austin's views of international law, see ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 23-24 (1971).

5. For an examination of the differences between sociology of law and Sociological Jurisprudence in this time period, see Roscoe Pound, *Sociology of Law and Sociology of Jurisprudence*, 5 U. TORONTO L. REV. 1, 1-20 (1943-1944).

ed, efforts were made to compel international law to account for social reality in the actual behavior of nations. Ultimately, "Realism" emerged as the dominant view—a political balance of power replaced liberalism's faith in the perfectibility of persons or nations. While often articulated in faint terms in the inter-war period by others, these two strands of legal science and politics were incisively woven together in 1940 by Hans J. Morgenthau. Keenly aware of the two American schools of legal thought, Sociological Jurisprudence and American Legal Realism, Morgenthau drew the substantive conclusion that orthodox international law was barren as a legal science and largely useless in its substantive efforts to lay out an effective program of world order. To Morgenthau, a plan to develop world order could be accomplished only through a vision of political Realism in foreign policy. Morgenthau, therefore, practiced as a Sociological Jurisprude in the area of international relations.[6]

While this article primarily focuses on international law, one of its additional purposes is to capture a forgotten aspect of American legal history. In particular, this article examines the impact that Sociological Jurisprudence and American Legal Realism had beyond the dimensions of municipal law. Roscoe Pound wrote sparingly about international law; Cardozo did not write on this subject. Yet their philosophies of law, so closely intertwined otherwise, helped to provoke a profound debate about the nature of international law, the role of law in international relations and how Americans should respond to the twenty-year crisis bracketed by the two World Wars.[7]

The core teaching of orthodox international law immediately before and after the First World War held that peace was the norm. Realists, especially after the rise of fascism in the 1930's, struck directly at this substantive conclusion with the argument that the threat of counter-violence alone was the essential guarantor of peace. Also, according to Sociological Jurisprudence and Realist doctrine, the failure of orthodox international law was its

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6. As used throughout this paper the term "Realism" refers to the belief in a political balance of power. The term "American Legal Realists" refers to the group of American legal theorists, including such personages as Karl Llewellyn, Jerome Frank, and Thurmond Arnold, who reached prominence by their efforts to modify municipal law in the period 1930-1950.

7. The term "twenty-year crisis" belongs to E.H. Carr. *See* E.H. CARR, THE TWENTY YEAR CRISIS 1919-1939 (2d ed. 1946). It must be strongly emphasized at the outset that this article makes no effort to evaluate the competing visions of international law and relations discussed herein. There is no intent to take sides in the great debate that has fascinated both academics and policymakers for the past century, or certainly since Woodrow Wilson and the efforts to effectuate the League of Nations.

adherence to an outworn philosophical methodology that refused to adapt to the developing principles of the social sciences. The dual thrusts created a crisis of legitimacy in international law.[8]

The central historical cause of this crisis was World War I. World War I was viewed by all sides as an unequivocal moral failure. The sides, however, differed in their analysis of the war's causes. To the orthodox, the outbreak of war simply affirmed the absolute necessity of future adherence to law as the alternative to war. To the critics of orthodoxy, the war signalled the bankruptcy of toothless appeals to law; reality meant the objective fact, as could be demonstrated by empirical social science, of a balance of power politics.

Beginning in 1923, Manley O. Hudson wrote an annual survey of the Permanent Court of International Justice for the American Journal of International Law. In 1941, he began his review with the observation that: "Events occurring during its nineteenth year created grave problems . . . and the Court survived the year with uncertain prospects for the future."[9] The following year Hudson noted that the "Permanent Court of International Justice was not active during its twentieth year."[10] For such an eminent jurist and scholar in the field of international law, these observations must have been personally devastating. Hudson had served as a judge on the Permanent Court of International Justice, was a member of the Permanent Court of Arbitration, a legal adviser to the Secretariat of the League of Nations, and was the Bemis Professor of International Law at Harvard. No other single American could match his record of practice and scholarly interest in the defense of the rule of law in world affairs. Ironically, the two decades of his most important contributions coincided with the outbreak of the crisis of international law.

To view this as a time of crisis may be somewhat of a semantic over-indulgence. It has been suggested that there never was

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8. The term "crisis of legitimacy" is commonly employed by American legal historians to describe the problems facing American municipal law as a result of the ideas set forth by the formalists in the late nineteenth century. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992). As noted later herein, the phrase is being purloined for the same descriptive purpose of its traditional usage. Certainly by the late 1930's, it was understood that international law was undergoing a deadly challenge, perhaps unparalleled in its history. W. Friedman, *The Disintegration of Western Civilization and the Future of International Law*, 2 MOD. L. REV. 194, 199-200 (1938).

9. Manley O. Hudson, *The Nineteenth Year of the Permanent Court of International Justice*, 35 AM. J. INT'L L. 1, 1 (1941).

10. Manley O. Hudson, *The Twentieth Year of the Permanent Court of International Justice*, 36 AM. J. INT'L L. 1, 1 (1942).

a time when "international law was not in crisis!"[11] The theory of international law, moreover, has been likened to "a bank of fog on a still day."[12] Whatever meanings have been attached to the theory of international law, the object here is to describe the particular impact that the social theory of law had on the formalist conception of international law in this time of crisis.

The formalist approach to international legal science was the chief concern of post-World War I critics. The orthodox approach to the theory of international law was first pronounced in American literature at the turn of the century by Lassa Oppenheim of Cambridge University.[13] Oppenheim's work argued that if "natural law" is excluded from consideration altogether, the "method to be applied by the science of international law can be no other than positive law."[14] Oppenheim stated that:

> The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and researcher may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law making conventions.[15]

Oppenheim observed that, because times have changed, it was no longer possible to follow Grotius and the natural law.[16] Furthermore, "case-law is of the greatest importance, for it brings into view the practice of the courts of the individual states."[17] Idealism was the highest value aspired to by international lawyers. Simultaneously, the "positive" method rejected the "ought," defined as "rules which we wish to be in force."[18]

Oppenheim believed that, in time, the thick development of case law and treaties would lead ultimately to a world federal law powerful enough to prevent states from going to war. Methodologically, his legal science drew a sharp distinction between facts that developed on the basis of existing recognized rules that were formally written down and hypotheses based on what the law "ought" to be. The latter should never have been confused with law because it produced nothing but imaginary truths. In its

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11. Johnston, *supra* note 1, at 3.
12. *Id.*
13. FRANCIS ANTHONY BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 313 n. 15 (1985).
14. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 333 (1908).
15. Oppenheim, *supra* note 14, at 333.
16. *Id.*
17. *Id.* at 339.
18. *Id.* at 355.

classical form, positive law would progress on the basis of written rules, hopefully attaining the perfection of a civilized code of international law.[19] Law had to be separated from morals and politics. Legal discourse was meant to be an apolitical, neutral jurisprudence.

As critics would later cry out, this was a formal system of "law in the books." It was a self-executing system of legal reasoning. Law existed only in cases and treaties, and case law was the product of juristic action interpreting the evolution of customary law. Legal reasoning in this structure was self-contained and self-perpetuating. Social reality, in terms of actual legal decisions, was beyond consideration.

By the time Oppenheim penned his jurisprudence, the casebook method was quickly becoming the acceptable form of teaching international law. The publication in London of a collection of cases by Pitt-Corbett in 1885 was not significantly used in the United States. The first casebook of international law published in America was written by Freeman Snow of Harvard and printed in 1893. In his preface, Snow paid tribute to the "case system introduced in the Harvard Law School a score of years ago by Professor Langdell."[20] In 1902, James Brown Scott issued a second casebook that was to extend Snow's earlier work but it resulted in a separate and distinct work.[21] Scott's casebook dominated the field for two decades. Lawrence B. Evans produced another casebook in 1917. In that same year Ellery Stowell and Henry F. Munro added another casebook to the literature. In the meantime, the distinguished international lawyer, John Bassett Moore, published his *History and Digest of International Arbitration* in 1898 and *Digest of International Law* in 1908.

Evaluating the growing use of the casebook method, Manley O. Hudson concluded that the "case-books greatly stimulated the study of international law, particularly in the law schools, and they improved the instruction within the colleges and in the law schools."[22] While the case method was America's most original contribution to modern legal education, it remained linked not

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19. *See* BOYLE, *supra* note 13, at 313; Johnston, *supra* note 1, at 24-26.

20. FREEMAN SNOW, CASES AND OPINIONS ON INTERNATIONAL LAW WITH NOTES AND A SYLLABUS iii (1893).

21. *See* JAMES BROWN SCOTT, CASES ON INTERNATIONAL LAW SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS, WITH SYLLABUS AND ANNOTATIONS (1902). Snow's book and the first edition of Scott's book were published by the Boston Book Company. A second printing of Scott was done by West Publishing Company in 1906, which was revised in 1922.

22. Manley O. Hudson, *The Teaching of International Law in America*, 15 AM. J. INT'L L. 19, 21 (1929).

only to law school pedagogy but to the very nature of legal science. The case method and treaty legislation formed the two pillars on which positivism rested. In effect, the casebook system of legal education put into practice the belief that legal decision-making could be self-executing and self-sufficient. That belief also goes by other names, including "legalism," or "legal sufficiency." It means that legal reasoning is conducted through the evolution and analysis of case law but is hermetically sealed off from any intrusion by extra-legal forces or considerations and most certainly against notions of instrumentalist or result-oriented jurisprudence. It is enough at this point to stress the fact that from its own methodological origins, the case method followed the conceptualism outlined by Langdellian legal philosophy. Positivism simply denies the relevance of reason and moral purpose because they do not reveal timeless truths. Therefore, positivists view law as a written body of rules having an independent and self-contained structure that is both separate and distinct from morality and history.[23] In the final analysis, however, Oppenheim's positivism adhered strictly to its idealistic faith that international law simply existed as written law, that nations were obligated to act in conformity with the rules of law, and that international law was capable of directing a stable world order. In true Langdellian fashion, any forward movement by the law was to be accomplished by following precedent and by leaping any gaps.

The idealistic vision was badly shaken by World War I. Even the famous philosopher of American pragmatism, John Dewey, noted an enormous decline in idealism and called for new ideas to relate idealism and the "intelligent" use of force.[24] In the aftermath of the war, lawyers sought to implement the "new world order" emerging from the Paris Peace Conference with the understanding that something had gone wrong with the orthodox positivist vision of international legal science.[25] Manley O. Hudson observed that the war had caused a great crisis in international law, entailing a loss of faith in its principles. Hudson ruefully stated that a general sense of skepticism pervaded the field, even to the extent of revisiting the Austinian argument as to the "existence of a law of nations which might properly be called law."[26]

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23. Berman, *supra* note 3, at 780.

24. John Dewey, *The Discrediting of Idealism*, 20 NEW REPUBLIC 285, 285-87 (Oct. 8, 1919).

25. *See, e.g.*, FREDERICK C. HICKS, THE NEW WORLD ORDER: INTERNATIONAL ORGANIZATION, INTERNATIONAL LAW, INTERNATIONAL COOPERATION (1920).

26. Manley O. Hudson, *The Development of International Law Since the War*,

For the next two decades, the philosophical structure of international legal science was divided between defenders of orthodox positivism and critics who increasingly drew intellectual inspiration from the new sociological approach to jurisprudence that had become the rage of the new lawyers in American municipal law. It was obvious, by any measure, that the debate mirrored the precise conflict between formalist and sociological law that ran across the municipal legal landscape both in America and in Europe.

The orthodoxy of positivism continued to call forth spirited defenders in the inter-war period. In 1919, in his address to the American Bar Association, David J. Hill cautioned his listeners to avoid being drawn to the side of force.[27] John Dewey supported the creation of a code of international law that he believed would stop lawlessness. Dewey's views were a direct rejection of Walter Lippmann's dire prediction that such a code would create a super-government.[28] The codification movement traced its origins back to the middle of the nineteenth century in both Europe and America but witnessed its most significant advance in the work of the Institute of International Law at the Hague. Its American counterpart was the American Institute of International Law that worked diligently in the inter-war period to provide a code. James Brown Scott hailed both bodies for providing the certain road to justice "which, expressed in rules of law, form a safe and secure guide for nations in their mutual intercourse."[29] The president of Columbia University, Nicolas Murray Butler, further insisted that individual morality and a nation's morality were identical in the sense of being bound to conform to the law.[30]

Phillip C. Jessup and John Basset Moore, both jurists and international lawyers at Columbia University, also staunchly

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22 AM. J. INT'L L. 330, 331 (1928).

27. David Jayne Hill, *The Nations and the Law*, 210 N. AM. REV. 439, 440-41 (Oct. 1919).

28. John Dewey, *War and a Code of Law*, 36 NEW REPUBLIC 224, 224-26 (Oct. 24, 1923). For Dewey's view of law as being a restraint and result-oriented, see John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26-27 (1924).

29. James Brown Scott, *The Codification of International Law*, 18 AM J. INT'L L. 260, 260 (1924). Scott's credentials as a positivist in this field were established by his article, John Brown Scott, *The Legal Nature of International Law*, 1 AM. J. INT'L L. 831 (1907).

30. Nicholas Murray Butler, *Development of an International Mind*, 9 A.B.A.J. 520, 521 (1923). As late as 1940, Butler, who was also the head of the Carnegie Endowment for International Peace, called for a new world order based on "liberalism," a term that was associated with the ideal of the rule of law rather than force. *Blaze Peace Path Butler Urges U.S.*, N.Y. TIMES, Jan. 1, 1940, at L16.

defended orthodoxy. Jessup originally complained bitterly in 1937 "[t]hat there is not inconsiderable lay opinion—shared, unfortunately, by some members of the bar—that international law exists only in books."[31] In fact, he concluded, international law "is enough of a reality."[32] Three years later, he wrote that "uninformed lay opinion . . . denies the existence of international law."[33] Jessup's book entitled *International Law and Some Current Illusions*, published in 1924, however, was a traditional exercise in the application of existing rules to various problems. By 1933, this judge of the Permanent Court of International Justice condemned the "new thought" that was "daily manifested . . . at conventions, lectures, dinners, and other public gatherings" and declared that "we must break with the past."[34] He concluded that: "What the world most needs today is a return to law, and to the orderly modes of action which the observance of law assures."[35] Positivism was further advanced by the writings of others, most notably Sir Hersh Lauterpacht and Hans Kelsen.[36]

The work of Manley O. Hudson deserves special consideration. While he was a devoted defender of the rule of law in international affairs, he may have been the first major figure in the field to call for a revision of the philosophical basis of international legal science. He, too, had suffered intellectually from the shock of 1914 and well understood the dismay of his colleagues in the early 1920's. By 1923, however, he felt more hopeful, noting the strides made by the League of Nations, arbitration conferences and what he termed a "new habit of mind" striving toward the pacific settlement of disputes.[37] In 1925, nevertheless, he twice

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31. Philip C. Jessup, *The Spanish Rebellion in International Law*, 15 FOREIGN AFF. 260, 262 (Jan. 1937).

32. Jessup, *supra* note 31, at 262.

33. Philip C. Jessup, *The Reality of International Law*, 18 FOREIGN AFF. 244, 253 (Jan. 1940). *See* Philip C. Jessup, *In Support of International Law*, 34 AM. J. INT'L L. 505, 505 (1940).

34. John Bassett Moore, *The New Isolation*, 27 AM. J. INT'L L. 607, 628 (1933).

35. Moore, *supra* note 34, at 629. *See also* John Bassett Moore, *An Appeal to Reason*, 11 FOREIGN AFF. 547 (July 1933); John Bassett Moore, *Post-War International Law*, 27 COLUM. L. REV. 400 (1927).

36. *See* HERSH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933). Kelsen and the theories of the "Vienna School" were introduced to American readers by such articles as Josef L. Kunz, *The Vienna School of International Law*, 11 N.Y.U. L.Q. 370 (1934). Kunz had been a student of Kelsen's in Vienna. Like many other European scholars, he had fled to America where he taught at the University of Toledo and spread Kelsen's stark positivism to American students.

37. Hudson, *supra* note 26, at 341.

announced that international legal science required new thinking. His first article, appearing in February of that year, boldly stated that it was time, in this quest for codification, for "new foundations" to be laid. Twentieth century changes mandated that international law go beyond Grotius in building a world society. Hudson reasoned that: "We must construct not merely a body of law, but also a legal philosophy that will give it vitality and power for growth."[38] In June he published his lectures at the Cornell Law School celebrating the ter-Centenary of Grotius. There he reiterated his argument that the foundations of the law, its aims and philosophical roots must be re-examined.[39] Condemning the sterility of nineteenth century ideas that merely studied what was handed down, he pointedly continued:

> It must be the aspiration of our twentieth century to make the statement that our law of nations conform to the facts of our present-day world, and we may have to admit that there is yet no law of nations by which all nations are bound.[40]
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> But in modern times, our international law has been too largely a field by itself. In spite of the frequent borrowing of analogies, it has lagged behind the evolution of municipal law, especially in America. It is not surprising therefore that so little draught has been made on other social sciences. But the future law of nations must seek contributions from history, from political science, from economics, from sociology and social psychology if it would keep pace with the society which it serves; and a sound philosophical basis for the international law of the twentieth century can only result from a "functional critique of international law in terms of social ends."[41]
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> Progress will be made when we begin to free ourselves from the "tyranny of phrases." . . . We must know the ends that our law is to serve before we can hope to make it serve them.[42]

Special emphasis should be placed on the fact that Hudson cited to the work of Roscoe Pound, his dean at Harvard and the most significant exponent of a new legal philosophy known as "Sociological Jurisprudence." Hudson thereby forged a crucial link between international law and the sociological nature of municipal law. His critique was almost a plagiarized embodiment of Pound's assault on Langdellian conceptualism. Subsequently cited by others who came to identical conclusions about the nature of international jurisprudence, Hudson's Cornell article

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38. Manley O. Hudson, *The Outlook for the Development of International Law*, 11 A.B.J.A. 102, 107 (1925).

39. *See* Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL L.Q. 419, 422-23 (1925).

40. Hudson, *supra* note 39, at 427.

41. *Id.* at 434-35 (citation omitted).

42. *Id.* at 435-36.

extended, with precision, the reach of Sociological Jurisprudence to international law in this period. He seemed to recognize that even though international law appeared to be a separate aspect of legal science because of its peculiar problems, especially in respect to the use of force, it was still tightly linked to general jurisprudence.

The lesson to be learned from Pound in the area of international law was that the new thinking of the twentieth century had to mount a revolt against the nineteenth century formalism. The Pound article cited by Hudson was the most compelling and rare instance where Pound, now in 1923, had turned his attention to international law and found it to be woefully lacking in intellectual vigor as was the legal science of Langdell.[43]

Ever the master legal historian in America, Pound's essay surveyed the history of legal thought up to the twentieth century and mounted a grueling analysis of positivism in international law:

> Positivist international lawyers sought to find by observation laws of development of an ordering of international relations, to verify these laws by historical and analytical investigation and to deduce their logical consequences in the form of legal rules. These laws of international development were conceived in various ways, as mechanical-physical, or biological, or perhaps economic. At any rate the positivist also would have nothing to do with consideration of what ought to be. . . . Positivist jurisprudence, in its first or mechanical stage, adopted this mode of thinking, substituting an idea of the mechanical operation of laws of progress or development for the Hegelian unfolding of the idea. . . . Attempts to make legal institutions or to make law were as futile as attempts to bring rain by means of sorcery. The nineteenth-century mechanical positivist had as little respect for the one as for the other.[44]
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> Looking back, then, it is not hard to see why the nineteenth-century achieved so little in international law. . . . They did not seek to be active agents in legal development. They expected legal development to operate itself from some internal momentum. The jurist was able to follow, arranging and ordering and systematizing or observing and verifying and thus discovering the foreordained lines of growth.[45]

Pound further insisted that international law had no plan for making new law or for adapting old materials to new situations. Pound argued that: "The conception of a slow and internally ordered succession of events and of institution, whereby things perfect themselves in evolving to be the limit of their idea has

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43. Roscoe Pound, *Philosophical Theory and International Law*, I BIBLIOTECA VISSERIANA 73, 73-90 (1923) (consisting of his lecture at the University of Leiden).

44. Pound, *supra* note 43, at 87.

45. *Id.* at 88.

ceased to reign."[46]

The cure could be found in "new philosophies of action" given to "social engineering" that took into account social psychology, sociology, economics, as well as law and politics.[47] The "juristic romance" which created "the cosmological romance of some closed metaphysical system" were to be subjected to a functional critique of international law in terms of social ends. Pound concluded that "legal organs must be understood 'as a process' and not 'as a condition.'"[48]

For Pound, the established formalism of international law was the same legalistic enemy that he fought for nearly two decades in the domestic legal arena. His target continued to be the influence of Christopher Columbus Langdell, Dean of the Harvard Law School in the years 1870 to 1895, and author of the casebook method. To Langdell, law was a science that should use the scientific method to fashion correct legal judgments from relatively few fundamental principles and concepts. His legal theory stressed the "inside" view of law as opposed to an "outside" view derived from the social sciences. The dichotomy corresponded to Pound's juxtaposition of law "in the books" and "law in action." Legal rules, according to Langdell, derived from abstract principles. Such rules were complete within themselves and self-executing. They provided a vision of a "rule of law" that implied the notion of a "government of laws, not of men." Central to the Langdellian system was the casebook method that instilled in students and jurists the belief that only cases mattered in the decision-making process. Law, therefore, was rule-bound, sealed against extra-legal considerations.[49] Among today's legal historians, Langdellianism is known variously as orthodoxy, deductive logic, conceptualism, classical legal thought, and formalism.[50]

Langdellian formalism drew the wrath of such critics as Oliver Wendell Holmes, Jr., Pound, and Benjamin Cardozo. Langdell's legal science, in their view, created a crisis of legitimacy in law

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46. *Id.* at 89.

47. *Id.*

48. *Id.*

49. The standard work on Langdell is Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). *See also* WILLIAM P. LA PIANA, LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN LEGAL EDUCATION (1994). *Cf.* Maria Speziale, *Langdell's Concept of Legal Science: The Beginnings of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980).

50. The voluminous bibliography on this subject is found in AMERICAN LEGAL REALISM 319-326 (William W. Fisher et al. eds., 1993) and in HORWITZ, *supra* note 8. The term "formalism" comes from MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949). *See also* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973).

by failing to respond to the phenomenal problems raised by the Industrial Revolution. Holmes set forth the famous maxim that "the life of the law has not been logic, it has been experience," and Pound's academic casting of "law in books" versus "law in action" carried the identical distinction.[51] Pound used other epithets, foremost among them was the term "mechanical jurisprudence."[52] To Pound, the chasm between the two versions of legal science could be resolved by consequentialist and functionalist theory carried into practice through the mechanism of social engineering. Mechanical jurisprudence was wrong because it would not account for results. It was unrealistic because it was out of touch with the way things were in actuality.

Cardozo's frontal assault on formalist legal science appeared in 1921 in his book, *The Nature of the Judicial Process*. Tracking Pound closely, Cardozo saw that "the demon of formalism tempts the intellect with the lure of scientific order."[53] Sociological Jurisprudence, by contrast, meant that the "power of social justice . . . finds its outlet and expression in the method of sociology."[54] Rules were malleable. Common law was pragmatic and its truth was relative, not absolute.[55] The purpose of law was the end result, the goal, and not the origin. A judge was to act as a legislator.[56]

By the middle of the 1920's, therefore, the legalistic system of both municipal and international law was being tested in the most profound sense by the new wave of social science. John Dewey's pragmatism attacked philosophical idealism by concentrating on consequentialist and functionalist truth. Coupled to the work of Felix Cohen, it could now be demonstrated that the deductive logic of formalism could not provide a self-executing method of argument from the general to the particular.[57] Pound's study of Grotius, furthermore, convinced him that while previous philosophical systems worked well for their times, the better methods leading to progress rested with newer sciences. Legal scientists "must turn to rational speculation, as distin-

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51. HORWITZ, *supra* note 8, at 4, 33, 187-88.

52. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

53. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921) [hereinafter THE JUDICIAL PROCESS]. *See also* BENJAMIN N. CARDOZO, GROWTH OF THE LAW (1924).

54. THE JUDICIAL PROCESS, *supra* note 53, at 66-78.

55. *Id.* at 102.

56. *Id.* at 98-141.

57. *See* Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937). Cohen stated that: "If you want to understand something, observe it in action." *Id.* at 8.

guished from the apocryphal 'reasons' of the nadir of philosophical jurisprudence and the formal logic of the jurisprudence of conceptions."[58]

Hudson's writings in 1925 had thereby sought to entice international lawyers across the river to the new land of Sociological Jurisprudence. As noted earlier, the strength of orthodoxy in international legal science came to be impaired but was certainly not overthrown. International legal science was no more defeated than Langdellianism.[59] In the decades between the wars, however, the demands that international law conform its philosophical basis to the dictates of social science became a common feature of the literature as written by both international lawyers and political scientists. In a much broader sense, the air was being filled by studies devoted to the sociology and anthropology of law.[60]

As the remnants of peace were being chewed away by the rise of fascism in the 1930's, international law, in fact, was accused outright of being irrelevant.[61] The Harvard political scientist, Payton S. Wild, concluded that: "International law may be a neat little science within itself, but if it fails to be of service in guiding the policies of states in matters of grave moment, the international lawyer cannot but be alarmed for his study."[62] Wild argued that international law should look to "politics and policies," to what "is" done and what "ought" to be done.[63] Writing for an American audience, the English commentators W. Friedman and Georg Schwartzenberg believed that international society could not be built upon customary international law and that, in order

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58. Roscoe Pound, *Grotius and the Science of Law*, 19 AM. J. INT'L L. 685, 688 (1925). Pound's earlier analysis of Grotius as a legal thinker appeared in Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605, 616-19 (1914), which made no reference to the theory of international law.

59. The question of whether formalism has ever been buried in municipal legal thought is still a subject of debate among American legal historians. *See* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

60. *See* Pittman Potter, *Political Science in the International Field*, 17 AM. POLITICAL SCIENCE REV. 381, 381-91 (1923); Edwin D. Dickinson, *The New Law of Nations*, 32 W. VA. L.Q. 4, 20 (1925-1926) (sociological law sought "the ideal from the world of realities as a starting point instead of constructing air castles first and trying to persuade the world to move in afterwards."). *See also* ALFRED BALD AND WILLIAM S. A. POTT, THE BASICS OF SOCIAL THEORY (1924); N.S. TIMASHEFF, THE SOCIOLOGY OF LAW (1940). The anthropologist Branislaw Malinowski reviewed *The Cheyenne Way* by Karl Lewellyn and E. Adamson Hoebel from the perspective of the growth of law in Branislaw Malinowski, Book Note, 35 AM. J. INT'L L. 1237 (1941-1942).

61. BOYLE, *supra* note 13, at 12.

62. Payton S. Wild, *What is the Trouble with International Law?*, 32 AM. POLITICAL SCIENCE REV. 478, 479 (1938).

63. Wild, *supra* note 62, at 492.

to avoid sterility, legal research in this field was required to relate to "the wider issue of social life."[64]

Efforts to link the science of international law and sociological jurisprudence were successful in at least two prominent books, both of which were published when the Second World War was underway in America. The first, and most sophisticated, was *Law Without Force: The Function of Politics in International Law*, published in 1941 by the Princeton political scientist, Gerhart Niemeyer. Niemeyer argued "that an obsolete and inadequate way of thinking is just as disastrous to the possibility of establishing order in the real world as is war or rebellion."[65] He further stated that: "It is not merely a theoretical issue."[66] Niemeyer's work, which cited to Roscoe Pound and Cardozo, proposed to set international law within the parameters of a "functionalism" based on "coordinate behavior" or "interconnectedness."[67] Niemeyer, in short, theorized that all rules of law, emanating from social behavior, must be "commonly directed towards specific ends."[68] This idea was clearly borrowed from Cardozo. According to Niemeyer, the problem with the past international jurisprudence was that it emphasized the "individual in existence" rather than the individual "in action," or the "Man Coordinate." As with Sociological Jurisprudence, international jurisprudence must look first to the results of its decisions. Ironically, in the context of the time in which he wrote, Niemeyer's lengthy and complex analysis rejected the use of force and spiritedly defended international law as the best hope for peace. The fatal flaw of the League of Nations was its ultimate reliance on force. When based on a proper philosophical foundation, international law would be able to command an "inherent rightness" that would bind all nations to its rules.[69]

A second major effort to couple the general sociology of law with American legal theorists appeared in 1942. Georges

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64. *Id.* at 479. *See* W. Friedman, *The Disintegration of European Civilization and the Future Civilization and the Future International Law*, 2 MOD. L. REV. 194, 214 (1938); Georg Schwartzenberg, *The Rule of Law and the Disintegration of International Society*, 33 AM. J. INT'L L. 56, 58 n.12 (1939).

65. GERHART NIEMEYER, LAW WITHOUT FORCE: THE FUNCTION OF POLITICS IN INTERNATIONAL LAW 18 (1941).

66. NIEMEYER, *supra* note 65, at 19.

67. *Id.* at 254-58.

68. *Id.* at 271.

69. *Id.* at 18-24, 249, 254-58, 265, 271. The citations to Pound and Cardozo should not be misleading. While Niemeyer understood their contributions in forcing a link between international law and the social sciences, he criticized both for their adherence to an atomistic conception of society rather than on coordinate human behavior. Niemeyer's reliance on Pound, however, was both scanty and misplaced.

Gurvitch, in *The Sociology of Law*, examined the Continental scholarship of Emile Durkheim, Eugen Ehrlich, and Max Weber as well as Holmes, Cardozo, Pound and American Legal Realists Karl Llewellyn, Jerome Frank, and Thurmond Arnold. Whatever differences existed between and among these writers, there was a basic agreement that all law, including the international branch, had to employ the methods of social science in order to be truthful.[70]

Pound wrote the introduction to Gurvitch's book. He discussed the several different views concerning the distinctive meanings of "sociological jurisprudence" and "sociology of law" but emphasized their common philosophy and method. The following year, Pound sharpened the distinctions in meaning and once again insisted that: "Law in all its senses is studied as a much specialized phase of what in a larger view is a science of society."[71] Legal institutions and doctrines, always subject to improvement "by reference to their ends by conscious, intelligent effort, are, in fact, forms of "social control."[72]

The demand that orthodox international legal science transform itself into a functional, result-oriented approach, therefore, was in full sway by the time World War II began. It appears that the reputation of international law fell in direct proportion to the rise of the sociological viewpoint. While it is equally true that this viewpoint issued forth from diverse sources often in conflict because of nuanced intellectual details, and may even have been cacophonous, it seemed obvious by this time that a great many voices were ganging up on the idealistic disciples of Oppenheim.

Surely the most incisive, brilliant, and provocative of these voices was Hans J. Morgenthau who, by roughly 1940, emerged as the *enfant terrible* of the study of international relations. Morgenthau made, in form and substance, the most formidable argument for the use of power in foreign policy. In the process,

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70. Although it can be said that American Legal Realists carried forth the ideas of the Sociological Jurisprudes, the two groups had developed serious differences. The former, especially under Llewellyn's guidance, sought to reduce law to a value-free scientific methodology. Pound and Cardozo, on the other hand, underscored a relationship between law and morals. Where the Sociological Jurisprudes were certain about values, Llewellyn and Frank were nihilists.

Their conflict, although not within the scope of this paper, drew little notice from international lawyers. Niemeyer rejected the approach of the Realists on the grounds that they were more concerned with a realistic knowledge about the practical question of how legal suits are decided rather than with the problem of where to find, measure, and evaluate the criteria of such decisions. NIEMEYER, *supra* note 65, at 257 n.22.

71. Pound, *supra* note 5, at 20.

72. *Id.*

and relying heavily on the ideas of such American legal scientists as Pound, Cardozo, Cohen, and Llewellyn, he became the central nemesis of orthodox international law.

Educated in Germany in law and political science, and fluent in French and English, Morgenthau was part of a wave of refugee-scholars who emigrated to America just ahead of their Nazi pursuers.[73] In accordance with the messages of Pound and Llewellyn, his writings during this time period persistently advanced the theme that the philosophical bases of international legal science in America had been largely illusory; that international law failed substantively in its goal of preventing war and that a stable international system can be founded substantively only on a balance of power among nations. In this sense, Morgenthau's singular achievement lay in combining an attack on the jurisprudence of international law with the substantive conclusion that power politics constituted the necessary framework of all diplomacy; hence, the validity of Realism.

Speaking of what was left of neutrality in 1938, Morgenthau wrote that:

> The rules of international law referring to the rights and obligations of neutrals have no independent normative existence of their own; they are only the expression of certain legal, economic, political, and military conditions to which they owe their existence. Should these conditions change, these rules change also; should these conditions cease to exist, these rules cease to exist. Only this legal sociological background can provide a scientific understanding of the legal value and practical impor-

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73. A biographical sketch of Morgenthau is in BOYLE, *supra* note 13, at 11 n.11. Morgenthau was admitted to the Kansas Bar. The profound influence of European scholarship was evident before 1930. This fascinating connection was prominently featured in the writings of American legal theorists, especially in the writings of Pound. *See, e.g.*, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 618-19 (1911) (tracing the current thought of new German lawyers and sociologists). Pound, like other American legal reformers, drew heavily on the work of German scholars, such as Eugen Ehrlich and Rudolf Jhering of Gottingen who rejected Pandektenwissenschaft because of its excessive generalization and obstruction. Roscoe Pound, *An Appreciation of Eugen Ehrlich*, 36 HARV. L. REV. 129, 130 (1922) (Ehrlich had been barred from visiting the United States in 1914.). Although Karl Llewellyn advised his friends to avoid referencing German sources in the 1930's because such reference could be the "kiss of death," he remained the closest link with German legal scientists. No pretense is made in this paper to explore that general linkage and influence. *See* THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD (Mathias Reiman ed. 1993) (published in Berlin) (articles by German scholars). An important survey of the influence of European sociological jurisprudence on international law is Hans J. Morgenthau, *The Problem of Neutrality*, 7 U.K.C. L. REV. 109 (1939). The standard work on the refugee-scholars in America is H. STUART HUGHES, THE SEA CHANGE: THE MIGRATION OF SOCIAL THOUGHT, 1930-1965 (1975).

> tance of the rules of neutrality in a changing international order.[74]
> The science of international law has always laid strong emphasis on absolute concepts, theoretical generalizations, and systematic constructions which would scarcely stand the test of the real law of nations.[75]

The following year, Morgenthau declared that parts of the Covenant of the League of Nations were "a dead letter."[76] The "moral and political philosophy which had been the foundation of international law is no longer recognized by the great nations."[77] It was "swept away by totalitarian conduct."[78]

Morgenthau's theoretical work in America, which tied together law and the new concepts of sociology, left no doubt as to its reliance on Cardozo and Pound. Traditional legal research, he argued, was concerned exclusively with the contents of legal rules. This approach asked "[w]hat is the rule of law to be applied in this case? and lets it go at that."[79] It was the orthodox belief that the mere text of the legal rule provided all the knowledge required to solve the problem. Pound and Cardozo correctly rejected this as "legalistic," "dogmatic," or "positivist." Morgenthau argued that the new vision could be derived from the model of the Brandeis Brief submitted in the famous case of *Muller v. Oregon*[80] that supplemented the text of law with pre-legal and post-legal factors.[81]

Morgenthau's most provocative and mature attack on international legal science, however, was made in his well-known article, *Positivism, Functionalism, and International Law*.[82] Once again his research was heavily dosed with references to Pound, Llewellyn, Louis Brandeis, and Continental scholarship. Morgenthau stated that: "Juridic positivism starts with the assumption that its subject-matter is to be found exclusively in the written law of the state."[83] He observed that: "Positivism transplanted schematically the highly refined positivist method of formalism and conceptualist interpretation into the domain of

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74. Morgenthau, *supra* note 73, at 109 (footnote omitted).
75. *Id.* at 110 (footnote omitted).
76. Hans J. Morgenthau, *The Resurrection of Neutrality in Europe*, 33 AM. POLITICAL SCIENCE REV. 473, 473 (1939).
77. Morgenthau, *supra* note 76, at 483.
78. *Id.* at 483-84.
79. Hans J. Morgenthau, *Sociology of Law*, 9 U.K.C. L. REV. 61, 62 (1940-1941).
80. 208 U.S. 412 (1908).
81. Morgenthau, *supra* note 79, at 62.
82. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940).
83. Morgenthau, *supra* note 82, at 265.

international law."[84] The "positive" law accepted rules as they were, without passing judgment on ethical values or practical application.[85] Positivism, moreover, separated law from ethics, psychology and sociology.[86] Sociological Jurisprudence and American Legal Realism destroyed the barriers between extra-legal considerations and the law. Where positivism had reigned almost unchallenged in Germany and Italy, totalitarianism killed it as "a manifestation of liberalistic decadence," and "positivism is no longer a guiding influence in modern legal thought."[87] "Law and nothing but the law," he wrote, was now a hollow slogan.[88] For present purposes, it is critical to note Morgenthau's statement that the "helplessness" of international law, "its sincere self-deception," resulted from the very "assumptions and methods which have led juridic positivism to defeat in the domestic field."[89]

Orthodoxy had to be replaced by a "functional theory of international relations."[90] Functional jurisprudence according to Morgenthau, was formulated by Pound, Llewellyn, Felix Cohen and others. "The direction of sociology" would lead to the study of law in the context of social science rather than reliance on the exclusive consideration of legal materials.[91]

In 1942, the Grotius Society in London, organized in 1915, passed a resolution proclaiming that: "Without enforcement by appropriate organs, international law will continue to be defied with impunity."[92] When the American Society of International Law met in Washington, D.C. in April of that year, Charles G. Fenwick of the board of editors of the *Journal* and professor at Bryn Mawr College, submitted a response: "The law of force must be repudiated."[93] The editorial comment in the *Journal*'s next issue bristled with the debate between the orthodox and the new Realism.[94] Edwin Borchard rejected the concept of "collective security": "war, in most cases, is not an international crime but a

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84. *Id.* at 272.
85. *Id.* at 261.
86. *Id.*
87. *Id.* at 263.
88. Morgenthau, *supra* note 82, at 263.
89. *Id.* at 265.
90. *Id.* at 273-84.
91. *Id.* at 274 n.43.
92. Quincy Wright, *The Future of International Law*, 36 AM. J. INT'L L. 451, 451 (1942).
93. Charles G. Fenwick, *The Fundamental Principles of International Law*, 36 AM. J. INT'L L. 446, 446 (1942).
94. Wright, *supra* note 92, at 451. For whatever reason, these comments made no reference to Morgenthau's writings.

social disease" to be cured by "economic and social physicians" rather than "political theologians."[95] Herbert W. Briggs, also an editor, cited Hudson's Cornell article of 1925 when he called for more "scientific study of what states actually do."[96] Clyde Eagleton of New York University urged that international legal science study technical, social and economic conditions. Eagleton stated: "Nor is it possible to prevent war by mere fiat, by the legal phraseology of a treaty. Words alone can not do it; the law must have behind it a physical strength sufficient to stop the war-maker."[97]

It was left for Philip Marshall Brown to defend the existence of international law while mounting a bitter assault on the traditionalists: "[L]ike monks . . . [they] are more interested in theories and abstract speculation . . . . Like Byzantine logothetes, they have fenced over fine legal distinctions."[98] The use of the casebook method indicated that "the student emerges with little more than an encyclopedic knowledge of cases and precedents. He has gained no real knowledge of the true nature of the law of nations."[99] Brown concluded that there "is an immense need of what Roscoe Pound has well termed the 'engineering attitude' of approach to new problems."[100]

By this time, Realism seemed to be winning the day. Nicholas Spykman and Walter Lippmann pushed forward their visions of power politics.[101] Albert Einstein predicted that the League of Nations would be re-created as an armed league to enforce peace, because a military counter balance to Hitler was required at this moment.[102]

As hostilities came to an end in 1945, Morgenthau published his book, *Scientific Man vs. Power Politics*, which compiled wartime lectures given at the New School for Social Research. Badly shaken by the fall of France in 1940, Morgenthau turned his

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95. Edwin Borchard, *The Place of Force in International Law*, 36 AM. J. INT'L L. 628, 631 (1942).

96. Herbert W. Briggs, *Re-Examination of International Law*, 36 AM. J. INT'L L. 637, 639 (1942).

97. Clyde Eagleton, *Forces which will Shape the Rebuilding of International Law*, 36 AM. J. INT'L L. 640, 642 (1942).

98. Philip Marshall Brown, *The Renovation of International Law*, 36 AM. J. INT'L L. 631, 631 (1942).

99. Brown, *supra* note 98, at 634.

100. *Id.* at 636.

101. *See* NICHILAS J. SPYKMAN, AMERICA'S STRATEGY IN WORLD POLITICS: THE UNITED STATES AND THE BALANCE OF POWER (1942); WALTER LIPPMAN, FOREIGN POLICY: SHIELD OF THE REPUBLIC (1943).

102. *See Einstein Predicts An Armed League*, N.Y. TIMES, June 23, 1940, at I6; OTTO NATHAN AND HEINZ NORDEN, EINSTEIN ON PEACE 246 (1960).

wrath to the fallacies of liberalism and idealistic philosophical rationalism and criticized the belief in the perfectibility of human conduct. The age of reason, progress and peace had been shattered by fascism. Human nature admittedly was rational in part, but it also was biological and spiritual. Morgenthau stated: "This re-examination must start with the assumption that power politics, rooted in the lust for power which is common to all men, is for this reason inseparable from social life itself."[103] The illusion of perfectibility was tragically applied to the international field where, as Pound had cautioned, it ended up in an "orgy of idealism and extravagant faith in the perfectibility to be brought about by law."[104] The illusion was that: "Liberal philosophy and practice sees in the judicial process the ideal method of settling international disputes."[105] Morgenthau concluded:

> Thus an age which seems to be unable to meet the intellectual and moral challenge of true statesmanship or to face in time the cruel alternative to its political failure takes refuge in illusions: the illusion of international law as a standard for political action, the illusion of a naturally harmonious social world, the illusion of a social science imitating a model of the natural sciences which the modern natural sciences themselves no longer accept.[106]

The study of international law as envisioned by Lassa Oppenheim thus had been called into question in a most profound sense. Oppenheim sent out a call to idealists to structure an international law able to induce a stable world order. At the opposite pole in time stood Morgenthau, the foe of idealism and champion of power politics. The time continuum between Oppenheim and Morgenthau had been factually marked by two unparalleled wars against world civilization and intellectually wrenched by the impact of social science in all fields of human knowledge, including the study of general jurisprudence. Formalist international law in America could not have escaped the influence of Pound and Llewellyn any more than municipal law. It remained problematic to unify jurisprudence and social science.[107] This, however, was not the message of sociological legal culture in the inter-war years. During the inter-war period, it was the standard intellectual fashion to take social science at its word.

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103. HANS J. MORGENTHAU, SCIENTIFIC MAN VS. POWER POLITICS 9 (1946).
104. MORGENTHAU, *supra* note 103, at 111.
105. *Id.* at 108.
106. *Id.* at 121.
107. JULIUS STONE, LAW AND THE SOCIAL SCIENCES IN THE SECOND HALF CENTURY 48-49 (1966).

In the final analysis, it is important to note that, as international law, with its court, arbitration devices, and written law, clearly continues to exert great authority in world affairs, human beings continue to slaughter one another. In practical terms, Sociological Jurisprudence and American Legal Realism in the period between the wars could not suggest or build a prototype of action to be followed in either the municipal or international fields of legal science. The purpose of this article has been to suggest a story of how competing theories of law clashed at a moment in time in the fervent hope that further historical research can help to point the way to a better future.